## BRIEF IN SUPPORT OF PETITION

A statement of the grounds on which the jurisdiction of this Court is invoked, and a statement of the case, are contained, respectively, at pages 10-11 and pages 1-10 of this Petition and Brief, and are incorporated herein by reference.

## STATUTES INVOLVED

Sec. 601(c)(1), Rev. Act of 1932, 47 Stat. 169, 259:

"(c) There is hereby imposed upon the following articles sold in the United States by the manufacturer or producer, or imported into the United States, a tax at the rates hereinafter set forth, to be paid by the manufacturer, producer, or importer:

"(1) Lubricating oils, 4 cents a gallon; but the tax on the articles described in this paragraph shall not apply with respect to the importation of such articles."

Sec. 617:

"(e) There is hereby imposed on gasoline sold by the importer thereof or by a producer of gasoline, a tax of 1 cent a gallon, except that under regulations prescribed by the Commissioner with the approval of the Secretary the tax shall not apply in the case of sales to a producer of gasoline.

"(b) If a producer or importer uses (otherwise than in the production of gasoline) gasoline sold to him free of tax, or produced or imported by him, such use shall for the purposes of this title be considered a sale.

"(c) As used in this section—

"(1) the term 'producer' includes a refiner, compounder, or blender, and a dealer selling gasoline exclusively to producers of gasoline, as well as a producer.

"(2) the term 'gasoline' means gasoline, benzol, and any other liquid the chief use of which is as a fuel for the propulsion of motor vehicles, motor boats, or aeroplanes."

Sec. 211(a), Act of June 16, 1933, 48 Stat. 195, 208:

"(a) Effective as of the day following the date of the enactment of this Act, section 617(a) of the Revenue Act of 1932 is amended by striking out '1 cent' and inserting in lieu thereof '1½ cents.'"

## OPINIONS BELOW

The opinion of the Circuit Court of Appeals by BRATTON, C. J., appears at pages 700-716 of the Record. It has not yet been printed in the reports. The opinion of the trial court is reported in 26 Fed. Supp. 694, and appears at pages 294-313 of the Record.

## ARGUMENT

1.

Statutes levying excise taxes are not remedial laws, nor founded on any permanent public policy. Imposing burdens upon the public and restricting the pursuit of occupations and the enjoyment of property, to sustain a tax a given case must come clearly within the letter of the

statute. The tax imposed by the statutes involved herein is not a common burden upon all property, nor upon all the people. It is not a general, but a special tax, reaching only to special cases, and affecting only a special class of persons. That special class of taxpayers have the right to be technically brought within the law before being subjected to its special burdens. This Court has so construed certain excise taxes.

In *Founders General Corporation* v. *Hoey*, 300 U. S. 268, certificates of corporate shares subscribed for by A, were by his direction and for his convenience, issued to B as his agent. Stamp taxes were held payable upon the original issuance, and also upon the subsequent transfer of the certificates from the agent to his principal, although the agent had no beneficial interest in the certificates whatever. See also *Raybestos-Manhattan, Inc.*, v. *United States*, 296 U. S. 60. "There must be a fixed and indisputable mode of ascertaining a stamp tax." *Founders General Corp.* v. *Hoey, supra; Hatch* v. *Reardon*, 204 U. S. 152, 159.

The decision of the Circuit Court of Appeals is grounded on decisions construing income tax statutes; therefore, is apparently in conflict with these decisions of this Court.

2.

If these decisions under a stamp excise tax are not applicable, then Congress has clearly indicated that intercompany transactions are taxable under manufacturers excise tax statutes, and the Treasury Department has estab-

lished a settled practice in conformity with that intention of Congress.

The Circuit Court of Appeals has decided this question in a manner contrary to the intent of Congress, and to the settled practice of the Treasury Department.

Sec. 619(b), Revenue Act of 1932.

Cum. Bul. XI-2, pp. 513-14.

Regulation 46, Art. 15, Revenue Act of 1932. (See Appendix.)

The construction placed by the Department of Justice upon a comparable transaction occurring after the effective date of a comparable excise act is disclosed in the district court case of *Pickwick Corporation* v. *Welch*, reported in 21 Fed. Supp. 664, 670. In that case the Department urged, and the trial court held:

> "The Congress, by legislation, and the Commissioner of Internal Revenue, by regulation, has recognized the fact that income taxes should be based upon the general principle of levying the tax according to the true net income of a single enterprise, even though the business is operated through more than one corporation. * * *
>
> "A careful examination of the sections of the Revenue Acts of 1924 and 1926, which have been hereinbefore quoted, seems to indicate clearly that the Congress intended an excise tax to be paid upon the sale or leasing of a taxable article to an affiliate. Sections 600 and 601(a). We cannot see how, except by a sale, the ownership of these bus bodies was transferred from parent to subsidiary. Each transaction was at a profit to the Corporation. Each transfer was absolute, title passed and the charge against the Sys-

tem in the Corporation's books was such as would ordinarily obtain between persons dealing at arm's length. Section 240(c) of these Revenue Acts (quoted *supra*) leaves no doubt as to the existence of an affiliation between the Corporation and the System.

"On the one hand, in dealing with excise taxes, Congress has said in section 601(a) of these Revenue Acts that the excise tax which the Court is now considering shall be imposed upon intercompany transactions in bus bodies; and on the other hand, in dealing with income taxes, Congress has said in section 240 of the Revenue Act of 1926 that intercompany transactions shall be eliminated in computing the consolidated net income of affiliated corporations which elect to file consolidated returns for income tax purposes. In other words, the statutory treatment of intercompany transactions seems to be exactly opposite in the determination of the excise tax of affiliated corporations from that used in computing the consolidated income tax of affiliated corporations. It will be noted that in the case of income taxes the taxpayer is given an election; in the case of excise taxes there is no choice if the taxpayer permits himself to come within the act."

Petitioner believes a determination of this question by this Court is important, and of general public interest.

3.

In the opinion the Circuit Court of Appeals says a taxpayer has the right to avoid *in toto* that which otherwise would be his tax liability, provided the method employed to accomplish that end is permitted by law; also, that the separate entities of a corporation and its single

stockholder generally are preserved in matters relating to taxes.

It states the principle that where stock ownership is employed for the purpose of dominating and controlling a subsidiary, the subsidiary becomes an instrumentality of the parent; and, where to recognize the separate corporate entity would work a fraud or injustice, the two corporations are treated as merged.

Any tax question aside, was the transaction of June 20, 1932, a sale to Conoco? Did ownership of the gasoline pass to it on that date?

Generally, the essential elements of a sale are: (1) competent parties; (2) a thing sold; (3) a price, or consideration; and (4) mutual agreement of the parties.

Petitioner and Conoco were duly organized corporations, engaged in producing and/or marketing gasoline. Sales and purchases of gasoline had occurred between them for three years prior to June, 1932.

On June 6, 1932, the Revenue Act of 1932 was passed, making the sections here involved effective June 21, 1932. Those sections only taxed sales of gasoline by a producer; jobber sales were tax free. Congress failed to amend the Act by making jobber sales taxable, even though the Treasury Department advised that a refusal to remove the "serious discriminations" in the Act would result in a transfer of large stocks by producing companies to affiliated sales companies, and they "can do this through their affiliates in the usual course of business" (R. 346). It was

always recognized each was competent to contract with the other.

Petitioner on June 20, 1932, had finished gasoline in the terminals of a common carrier. Nothing had to be done to put that gasoline in a marketable condition. That gasoline was the "thing sold."

Conoco agreed to pay the purchase price. Article 5 of Regulation 44 under the Revenue Act of 1932 said, in part, in the determination of when title passed:

> "In the case of a sale on credit, it is immaterial whether or not the purchase price is actually collected"

recognizing the rule

> "It is the agreement to pay, rather than the actual payment of the price, which is the essential element of a sale."
>
> 23 R. C. L., p. 1277.

There was mutual agreement of the parties evidenced by the execution and delivery of the bill of sale by petitioner, and the acceptance of delivery of the gasoline by Conoco. This being a fungible commodity, the execution of the bill of sale was a delivery thereof, and sufficient evidence of the passing of title thereto. *Waldock* v. *Frisco Lbr. Co.*, 71 Okla. 200, 176 Pac. 218. The Commissioner recognized the existence of all these necessary elements of a valid sale in the transactions between these parties to the extent of Conoco's "normal requirements," but this Court will readily observe that requirements to enable Conoco to compete with other jobbers in its marketing

area on an equal cost basis after June 21, 1932, and June 17, 1933, can only be measured by the abnormally increased inventories of its competitors, and not by its usual requirements before the enactment of the statutes here involved.

That the parties intended the title to pass to Conoco on June 20, 1932, can hardly be denied. That was the very essence of the corporate purpose motivating the purchase and sales. Immediately upon completion of the transaction the carrier who had the custody of the gasoline sold to Conoco, was notified of the sale and that further movement of that gasoline would be subject to Conoco's orders. Certainly it would have required a comparable series of transactions to have put title back in petitioner on June 21, 1932, and June 17, 1933.

Had there been no intention on the part of petitioner and Conoco to divest petitioner of the ownership of the gasoline on the 20th day of June, 1932, the actions of the petitioner and of Conoco after that date were wrongful and fraudulent, because by the nonpayment of the tax on subsequent sales the petitioner represented to the Government that it had completely divested itself of ownership of the gasoline prior to the effective date of the act, and if it had not intended that such ownership should pass on the 20th day of June, 1932, it knowingly evaded a tax liability through fraudulent representations as to the sale to Conoco. The same is true as to the sale on June 14, 1933. But such representations are negatived by the finding of the trial court and the Circuit Court of Appeals

hat the transactions were not fraudulent, nor were they therwise illegal.

The Circuit Court of Appeals having found specifically hat the transfers in question were not tainted with fraud, ior were they otherwise illegal, it must have found that he method employed to avoid the forthcoming tax was a nethod permitted by law. Because of the same finding of act, the Circuit Court of Appeals has negatived the ap-lication of the so-called instrumentality doctrine, because hat doctrine is only brought into operation where the ubsidiary has been used as an instrumentality to perpe-rate a fraud or a wrong against a complainant. *Taylor v. Standard Gas & Electric Co.*, 306 U. S. 307, 322. The nly complainant here is the United States, and its only omplaint is the avoidance of the tax. But the Circuit Court of Appeals said that purpose is not wrongful nor llegal. That Court quotes from *Higgins* v. *Smith*, 308 J. S. 473, as follows:

> "The government may not be required to acquiesce in the taxpayer's election of that form for doing business which is most advantageous to him. The government may look at actualities and upon determination that the form employed for doing business or carrying out the challenged tax event is unreal or a sham, may sustain or disregard the effect of the fiction as best serves the purposes of the tax statute."

But again, that Court found that the "event" was iot unreal or a sham, because had it been either, the trans-fer and the subsequent actions based upon the transfer would have been fraudulent and entirely illegal, and that

Court has made the specific finding that they were not tainted with fraud nor otherwise illegal.

The cited case was a case involving income taxes, and applying congressional intent in respect of income taxes, this Court said:

> "It is command of income and its benefits which marks the real owner of property."

In other words, Smith and his wholly-owned corporation were treated as a single economic unit for the determination of gains or losses with respect to the income tax. But Congress has legislated in respect of excise taxes upon an entirely different basis.

The Circuit Court of Appeals then says:

> "The transfers in question here were not tainted with fraud, and they were not otherwise illegal. But it is clear beyond doubt that the generating motive for the making of them was tax consequences. That is so plain that elaboration is unnecessary. The facts and circumstances preceding, attending and following the transactions lead to the conclusion that in respect of liability for excise tax, the subsequent sales of the gasoline and oil were the equivalent of sales by Continental in its own right. *Griffiths* v. *Commissioner, supra; Higgins* v. *Smith, supra.*"

The Court's attention is called to the fact that the reason for the purchase by Conoco had no relation to an avoidance of tax liability, but was solely to enable Conoco to compete with its competitive jobbers on an equal cost basis. The purpose of the sale to Conoco was to protect the petitioner, which was also a retail dealer, against the dis-

crimination created by the act in favor of its competitive dealers whose sales after June 20, 1932, and June 17, 1933, were tax free as distinguished from sales by it which were taxable under the act. That was the real business purpose of the sales. Any wrong to the complainant being absent—and the Circuit Court of Appeals found no wrong was done because what was done was legal and free from fraud—and a real corporate purpose being present, it is evident the conclusion of the Circuit Court of Appeals is based solely upon the "generating motive" for the sales being tax avoidance. Therefore, the decision is in conflict with the principles declared in *Superior Oil Co.* v. *Mississippi*, and *Gregory* v. *Helvering*, *supra*, that a taxpayer may avoid an imminent tax liability by lawful means.

4.

The trial court made the following finding of fact:

"No. XXXI.

"The stock of gasoline held in Great Lakes after the transfers of June, 1932, was mixed or blended by Great Lakes on Continental's order, in accordance with the specifications of the marketing committee of the proprietary companies, among whom was neither Conoco nor Nevada. Thus, 400 end point and 420 end point gasoline were blended by Great Lakes on Continental's order, resulting in a new grade of gasoline, solely on Continental's order, even though the gasoline on Continental's books belonged to the other companies. This blending and mixing was ordered by Continental on its own order, without authority either from Conoco or Nevada, who were not connected with the transaction and who received no profit from it" (R. 322).

When evidence was first offered on the subject of blending by the respondent, objections were made and the trial court stated that the evidence would not be considered on the subject of blending unless the decision of the Court on the main question should be for petitioner (R. 228-253). The Court also advised petitioner that no testimony need be offered as to blending, nor need the question be briefed (R. 271).

Notwithstanding the statements, the Court made finding of fact XXXI, which was a finding upon an issue of fact which had been expressly reserved, and upon which the Court had not received either evidence or argument in petitioner's behalf.

The Circuit Court of Appeals, after referring to Section 617(c)(1), which makes a blender a producer under the act, says:

> "The entire record negates any foundation upon which it could be concluded that the court rested its decision and judgment upon the theory that the mixing constituted blending which rendered Continental liable for the tax."

Petitioner never contended the trial court held it liable because blending made it a producer under the act. It was always a producer whose sales were taxable on and after June 21, 1932, and June 17, 1933.

Petitioner did contend that in determining whether it exercised control over the gasoline sold to Conoco, after the sale, a finding by the trial court that petitioner, without Conoco's authority and for its sole benefit, took Con-

oco's gasoline and by blending made a new grade of gasoline, was a finding of fact the probative force of which on the mind of the trial court in reaching its conclusion as to control cannot be measured by an Appellate Court. It was a finding of fact upon an issue reserved and as to which the trial court, by its ruling, received no testimony or argument on behalf of petitioner.

That this finding largely influenced that Court in its determination of the case is evidenced by the statement in the opinion of the trial court in which the Court says:

> "The Court agrees with every contention of the plaintiff except on the question of control and the right to recover under the theory of unjust enrichment" (R. 312).

The force of such a finding in the determination of control is further evidenced by the statement of counsel for the respondent when this proof was offered to the effect that the reason the respondent felt so strongly about the matter of blending from the angle of control as well as blending was:

> "* * * That the handling of the products, which we say and allege are done by the parent company seems to us to be a very strong indication of the control of the products by that company" (R. 251-2).

In addition to that statement to the Court, the respondent submitted as one of his requests for special findings Request #29. This is verbatim the finding adopted and made by the Court as its finding of fact No. XXXI (R. 288).

The petitioner contends that the making of that finding, under the circumstances shown, constituted a denial of a hearing to petitioner upon an issue which the trial court considered material, and that the judgment rendered thereon and because thereof constitutes a departure from the accepted course of judicial proceedings, resulting in depriving petitioner of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. It is a clear violation of the requirement of law that a party shall be given an opportunity to be heard upon every material issue before judgment shall be rendered against him.

The Circuit Court of Appeals in its refusal to disapprove such procedure intimates that to remand the case would be an empty form—a concession to technicality. The same intimation was made in *Saunders* v. *Shaw*, 244 U. S. 317, but this Court, speaking through Justice HOLMES, said:

> "It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendants' rights are protected without giving him a chance to put his evidence in."

Except for the 704,000 gallons resold to petitioner and another subsidiary by Conoco (which the trial court, during the trial, stated was an ordinary and usual procedure in the business world) (R. 163), and the use by Conoco of certain order forms of Continental in ordering out shipments of gasoline (which the trial court found, during the

trial, did not mean such orders were made by Continental) (R. 204), the Exhibits #81 to #243, in substance, constituted the entire proof of control offered by the Government, and in the absence of a finding that there was a blending resulting in the creation of a different grade of gasoline from that which the warehouseman was obligated to deliver to Conoco on demand (R. 148), there would have been no substantial evidence upon which the trial court could have based a finding of control.

The determination of this case depended largely on the facts found by the trial court, if supported by evidence, which made it even more necessary that petitioner be afforded a hearing on every issue of fact considered by the trial court.

5.

Section 621(d), Title IV of the Revenue Act of 1932, is as follows:

> "No overpayment of tax under this title shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund."

There is no justification in the record for the applica-

tion of the doctrine of unjust enrichment. All that petitioner ever received from its sale of the gasoline to Conoco was the purchase price agreed upon, and all proceeds accruing from its subsequent sale by Conoco went into Conoco's own banking account, were used by Conoco in its own operations and after satisfaction of its own current liabilities, any surplus which it could safely spare was paid to petitioner to apply on the open running account for products supplied over the three-year period of Conoco's operations including these two purchases.

It is not disputed that the selling price was set by the market leader in Conoco's territory, and that the price at which Conoco sold was fixed by its own officers and not by petitioner. That price never included the tax except as to a few contract customers, in which cases the tax collected by Conoco was, by Conoco, remitted to the Government (R. 194).

Petitioner fully sustained the burden imposed by section 621(d), *supra*. It did not make the subsequent sales of this gasoline; it did not fix the price at which it was sold; and it received nothing in respect of such sales beyond payments on the purchase price of goods sold Conoco.

## CONCLUSION

A writ of certiorari should be granted as prayed in the petition.

Respectfully submitted,

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